Internal Revenue Service

memorandum

CC:TL-N-1333-90
Br4:RJFitzpatrick

date: FEB 16 1990

to: District Counsel, Greensboro SE:GBO
Attn: Jeanne Gramling

from: Assistant Chief Counsel (Tax Litigation) CC:TL

subject: [redacted], T.C. Dkt. No. [redacted]

This responds to your request for tax litigation advice on the above-entitled action. Your request to remove the small tax case designation in a factually favorable case to alleviate administrative concerns the facing the Service in the wake of Abeles v. Commissioner, 91 T.C. No. 1019 (1988) acq. I.R.B. 1989-31 (July 31, 1989), demonstrates an acute sensitivity to this issue and is appreciated by this office. However, as discussed below, we do not believe it is necessary to remove the "S Case" status.

ISSUE

Should respondent seek a motion to remove the small tax case designation to determine whether the latest filed return in the above-entitled action was properly processed by an IRS Service Center?

FACTS

On [redacted] notices of deficiency were mailed to the petitioner and her former husband, [redacted], at three different addresses. One of the addresses was the address reflected upon the petitioner's [redacted] income tax return. The notice sent to this address was returned by the United States Postal Service "Attempted - Not Known." Petitioner has furnished a copy of a U.S. Postal Service Change of Address Order dated [redacted] showing a change of address for [redacted]. The Post Office did not forward the Service's notice of deficiency and the Service not having received clear and concise notification of this new address by the petitioner, did not send a notice to this new address.

Petitioner's address on her [redacted] income tax return was yet another address. This return was processed by the Service on [redacted], only two days before the mailing of the notices in this case. In addition, on [redacted] the Service sent a copy of the notice, and the petitioner filed a timely petition.

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LAW AND DISCUSSION

I.R.C. § 6501(a) provides as a general rule that a deficiency in tax must be assessed within three years after the date on which the return in question was filed. Under I.R.C. § 6213, however, a deficiency in federal income tax generally may not be assessed or collected until after the taxpayer has been accorded notice of the deficiency and an opportunity to litigate the merits of the deficiency in Tax Court. Under I.R.C. § 6212, the Commissioner is authorized to provide this notice by sending a notice of deficiency by certified or registered mail to the taxpayer's "last known address."

The statutory framework contemplates that the Commissioner will send a notice of deficiency by certified or registered mail to the taxpayer's "last known address" within three years after his return is filed if the Commissioner determines that additional taxes are due. If the taxpayer does not file a timely petition, the Commissioner is authorized to assess and to collect the taxes determined to be due, but the taxpayer may still bring a refund suit challenging the merits of the Commissioner's actions. See, I.R.C. §§ 6213(c), 6511, 7422(a). If the notice requirements and time limitations are not complied with, I.R.C. § 6213(a) provides that the collection of the tax may be enjoined, notwithstanding I.R.C. § 7421(a) (commonly called the Anti-Injunction Act).

In addition to the statutory purpose of giving a taxpayer notice and an opportunity to petition the Tax Court, the deficiency procedures of I.R.C. §§ 6212 and 6213 serve an equally important purpose - to set a time certain for assessment and collection of tax deficiencies. To accomplish this purpose, actual receipt by the taxpayer of the notice of deficiency is not required to commence the running of the 90-day period within which the taxpayer may file a petition in the Tax Court. To the contrary, I.R.C. § 6212(b) explicitly provides that the notice of deficiency "shall be sufficient" if mailed to the taxpayer at his last known address, even if the taxpayer is deceased, or under legal disability. As the Ninth Circuit observed in Cohen v. United States, 297 F.2d 760, 772 (1962), cert. denied, 369 U.S. 865 (1962):

> * * * the Congress, when it "authorized" service by registered [or certified] mail, did not intend to require actual receipt by the addressee of the letter. Rather, it permitted the use of a method of giving notice that would ordinarily result in such receipt.

See also, Keado v. United States, 853 F.2d 1209, 1212 (5th Cir. 1988) and cases cited therein.

Thus, the statutory scheme contemplates the fixing of the date when assessments can be made, and at the same time, provide a method of notification which insures that the vast majority of taxpayers will be informed that a tax deficiency has been determined against them, thereby giving them an opportunity to contest such determination in the Tax Court prior to assessment and collection. The legislative history reflects that Congress explicitly considered, but rejected, a proposal that would have required actual receipt of the notice, because it would have imposed an impossible burden on the Commissioner. See, Revenue Act of 1924, ch. 234, 43 Stat. 253, Sec. 274(a); 65 Cong. Rec. 2969-2970 (1924) (proposed amendment by Rep. Allen). Further, because of its importance to the federal tax collection process, the courts construing I.R.C. § 6212 have consistently emphasized the need for certainty in the law relating to the requirements for mailing notices of deficiency. See, King v. Commissioner, 857 F.2d 676 (9th Cir. 1988); Cyclone Drilling, Inc. v. Kelly, 769 F.2d 662 (10th Cir. 1985); Tadros v. Commissioner, 763 F.2d 89 (2d Cir. 1985); United States v. Zolla, 724 F.2d 808 (9th Cir. 1984), cert denied, 469 U.S. 830 (1984); McPartlin v. Commissioner, 653 F.2d 1185 (7th Cir. 1981); Sorrentino v. Ross, 425 F.2d 213 (5th Cir. 1970); Berger v. Commissioner, 404 F.2d 668, 672 (3d Cir. 1968), cert. denied, 395 U.S. 905 (1969); Luhring v. Glotzbach, 304 F.2d 556, 559 (4th Cir. 1962).

The term "last known address" as used in I.R.C. § 6212(b)(1) is not defined by either the Code or the Regulations. Guidance as to its intended meaning, however, can be found in the fact that Congress enacted this provision for the stated purpose of relieving the Commissioner of "the obviously impossible * * * [task of] keep[ing] and up-to-date record of taxpayers' addresses." H.R. Rep. No. 2, 70th Cong., 1st Sess. at 22 (1939-1 C.B. (Pt. 2) 384, 399).

Consistent with the plain meaning and purpose of the provision, the cases applying I.R.C. § 6212(b) have recognized that "[a]dministrative realities demand that the burden fall upon the taxpayer to keep the Commissioner informed as to his proper address." Alta Sierra Vista, Inc. v. Commissioner, 62 T.C. 367, 374 (1974), aff'd without published opinion, 538 F.2d 334 (9th Cir. 1974). More recently, in United States v. Zolla, 724 F.2d 808, 810 (1984), cert. denied, 469 U.S. 830 (1984), the Ninth Circuit defined a taxpayer's "last known address" as the address on his most recent return, unless the taxpayer communicates to the IRS 'clear and concise' notice of a change in address" (citing McPartlin v. Commissioner, 653 F.2d 1185, 1189 (7th Cir. 1981); Alta Sierra Vista, Inc. v. Commissioner, supra). "Clear and concise" notice is accomplished by the taxpayer's indication to the Service that he wishes the new

address to replace all old addresses in subsequent communications. See, Alta Sierra Vista, Inc., supra, 62 T.C. at 365. Accord, Cyclone Drilling, Inc. v. Kelly, 769 F.2d 662, 664 (10th Cir. 1985) ("[t]he address on the taxpayer's most recent return will * * * ordinarily be the taxpayer's last known address unless further 'clear and concise' notice is provided to the IRS subsequent to the most recent return"). See also, Crum v. Commissioner, 635 F.2d 895, 898-899 (D.C. Cir. 1980).

Abeles v. Commissioner, 91 T.C. 1019 (1988), acq., 1989-31 I.R.B. 4 involves significant developments in the Service's responsibility to send duplicate notices to both joint filers under I.R.C. § 6212(b)(2) and its responsibility in ascertaining the taxpayer's "last known address." The Service has announced an acquiescence in Abeles; a taxpayer's "last known address" is now that address which appears on the taxpayer's most recently filed and reasonably processed return, unless the Service received clear and concise notification of a new address from the taxpayer.

Absent clear and concise notification of a change of address, the Service is entitled to rely on the taxpayer's address as stated on the taxpayer's most recently filed return as of the date of the issuance of the notice of deficiency. Pomeroy v. United States, 864 F.2d 1191 (5th Cir. 1989). Correspondence bearing an address different from that on the most recent return does not, by itself, constitute clear and concise notification. In order to supplant the address on his/her most recent return, the taxpayer must clearly indicate that the former address is no longer to be used. King v. Commissioner, 857 F.2d 676 (9th Cir. 1988); Johnson v. Commissioner, T.C. Memo. 1989-227.

As your incoming request correctly indicates, the taxpayer's "most recently filed return" is that return which has been properly processed by the Service such that the address appearing on such return was available to the agent when that agent prepared to send a notice of deficiency in connection with an examination of a previously filed return. Ward v. Commissioner, 92 T.C. No. 60 (May 10, 1989); Yusko v. Commissioner, 89 T.C. 806 (1987); Keith v. Commissioner, T.C. Memo. 1987-591; see also Lincoln v. Commissioner, T.C. Memo. 1988-93 (Filing of Form 4868 does not give the Service sufficient notice of new address absent express indication on the form that he is using the new address as his mailing address); Soria v. Commissioner, T.C. Memo. 1986-206; Singer v. Commissioner, T.C. Memo. 1986-193.

There is no doubt that the judicially promulgated rules on "last known address" pose significant problems for the

Service's administration and collection of taxes and we have been in formal communication with personnel from various effected Offices of Assistant Commissioners to attempt to determine what modifications are necessary and develop strategies to come to grasp with the recent developments in this increasingly difficult and important area. However, we do not believe it is necessary to remove the "S Case" status since the development of the definition of "reasonable processing time" has been favorable to the Service in the Tax Court.

Additionally, several administrative actions have been taken in the wake of Ableles. In an effort to improve the Service's address processing, a Multifunctional Address of Record/Undeliverable Mail Study Group was formed. The objective of this study is to reduce the amount of Service mail which is returned undelivered and still, consistent with existing case law, mail notices to a taxpayer's "last known address." In addition, the approach of this Study Group is to take a fundamental look at "how the Service should do business" and determine what systems would better our relations with taxpayers in this problem area. An Advisory Report has been prepared which assesses known locator systems and perceived procedural and systematic problems in the procedures, processes, and data bases the Service now uses in the area of address correction. The Study Group is now utilizing this report as its initial agenda for taking an accelerated, proactive stance in resolving taxpayer address of record problems. We believe that the actions by this Study Group and the administrative actions in this area should alleviate the need for further litigation driven solutions to the Service's problems in this area and result in more positive administrative solutions in this area. For the foregoing reasons, we do not believe removal of the "S Case" status is necessary.

If you have any questions concerning this matter, please contact Robert J. Fitzpatrick at FTS 566-3345.

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